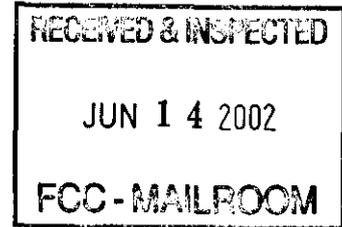


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
AMIGO.NET)
)
For Declaratory Ruling Regarding the Effect of)
Sections 253 and 257 of the)
Telecommunications Act of 1996 on an)
Agreement for Multi-Use Network:)
Infrastructure Development, Statewide)
Telecommunications Service Aggregation, and)
Network Management)

CC Docket No. 00-220

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2002

Released: June 13, 2002

By the Wireline Competition Bureau:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses the petition Amigo.Net filed July 5, 2000, requesting that the Commission preempt execution of a contract between the State of Colorado and US West (now, Qwest) for the provision of advanced telecommunications services in Colorado.¹ Under the contract, Qwest would construct a statewide network capable of providing high-speed telecommunications services and would provide such services to agencies of the state government. Amigo.Net asserts that this contract and the state process that led to its formation violate sections 253 and 257(b) of the Communications Act of 1934, as amended. As discussed below, we find the record insufficient to demonstrate that Colorado has violated sections 253 or 257(b) of the Act. Therefore, we deny Amigo.Net's petition.

II. BACKGROUND

2. In February 1998, Colorado issued a strategic plan for the development of a statewide telecommunications network, through private/public partnerships.² The plan called for the creation of a single network, consisting of more than 70 Aggregated Network Access Points (ANAPs), to link the counties of the state and provide access to schools, libraries, and other agencies of the state government. If implemented, the plan would permit all agencies of the state to use a single network, replacing the current system where agencies contract for

¹ Petition for Declaratory Ruling and Injunction Pending Ruling, CC Docket No. 00-220 (filed July 5, 2000) (Petition).

² Petition at 2; Colorado Comments at 3.

telecommunications services piecemeal. The plan sought build-out of advanced services statewide, particularly to rural areas.³

3. In October 1999, Colorado issued a "Request for Proposal for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management" (RFP).⁴ The RFP contemplated a Prime-Contractor, perhaps working in conjunction with a number of Sub-Contractors, to build, manage, and operate a Multi-Use Network (MNT or network) to serve state government agencies, as well as "higher education sites, local government, and other public entities, such as K-12 schools, healthcare facilities, and libraries."⁵ The RFP also envisioned awarding a "statewide pricing agreement."⁶ In April 2000, Colorado awarded a contract under the RFP to Qwest, and announced that Qwest would partner with three independent companies to build the network.⁷ Under the agreement, Qwest would build an ANAP network and provide advanced telecommunications services to agencies of the state over that network.

4. Amigo.Net filed a petition for preemption, seeking a declaratory ruling that the contract, and the process that led to its formation, violated sections 253 and 257(b) of the Act.⁸ Amigo.Net also asks the Commission to enjoin performance of the contract pending its decision on the petition.⁹ Amigo.Net claims that Colorado mandated a single contract to construct the ANAP network, and approved a flat statewide pricing scheme.¹⁰ According to Amigo.Net, Colorado's actions imposed a legal requirement that prohibited or had the effect of prohibiting any entity from providing advanced services.¹¹ In addition, Amigo.Net argues that Colorado created a barrier to market entry that would exclude small businesses from providing advanced services to customers in Colorado.¹² In response to Amigo.Net's Petition, the State of Colorado, Qwest, and BrandX Internet each filed comments, and Amigo.Net and the Association for Local Telecommunications Services (ALTS) each filed reply comments.¹³

³ Colorado expects that the ANAP network will bring advanced services to rural areas that currently lack these services and permit efficient use of state resources in obtaining high-speed services for government agencies, schools, and libraries. Colorado Comments at 3, 15.

⁴ Petition at 5; Colorado Comments at 4.

⁵ Colorado Comments at 4, quoting RFP at 5. See Amigo.Net Reply at 6.

⁶ Colorado Comments at 5, citing RFP at 27.

⁷ Petition at 5; Colorado Comments at 6.

⁸ Petition at 1. See *Pleading Cycle Established for Comments on Amigo.Net's Petition for Declaratory Ruling*, Public Notice, 15 FCC Rcd 22510 (2000). On November 30, 2000, Amigo.Net filed a motion requesting an extension of time to file reply comments. A brief two-day extension was granted. See *Amigo.Net, Petition For Declaratory Ruling Regarding the Effect of Section 253 and 257 of the Telecommunications Act of 1996 on an Agreement for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management*, Order, 15 FCC Rcd 24163 (2000).

⁹ Petition at 1.

¹⁰ *Id.* at 10-11.

¹¹ *Id.* at 11.

¹² *Id.*

¹³ On February 8, 2001, Amigo.Net filed a single-page letter notice of *ex parte* communication, regarding a meeting between Amigo.Net representatives and Commission staff. The letter indicates that Amigo.Net provided

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III. DISCUSSION

A. Overview

5. Amigo.Net seeks preemption of Colorado's contract with Qwest, pursuant to section 253 of the Communications Act, which Congress enacted to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition.¹⁴ In assessing whether to preempt enforcement of the Qwest contract pursuant to section 253, we first determine whether the agreement falls within the scope of subsection 253(a), which states that no state or local requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹⁵ Next, we determine whether this contract creates a legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. If we find that the Qwest contract is proscribed by subsection 253(a) standing alone, we must then determine whether the contract falls within the reservation of state authority set forth in subsection 253(b), which excludes from the scope of the Commission's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in subsection 253(b).¹⁶ If a law, regulation, or legal requirement otherwise impermissible under subsection 253(a) does not satisfy the requirements of subsection 253(b), we must preempt the enforcement of the requirement "to the extent necessary to correct the violation" in accordance with subsection 253(d).¹⁷ This is the approach that the Commission has taken in prior orders addressing section 253.¹⁸

6. For the reasons stated below, we find that Amigo.Net has not shown that Colorado's contract with Qwest creates a legal requirement that prohibits other carriers from providing advanced services to the public, in violation of section 253.¹⁹ Because the record does not

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staff with information regarding company history and a U.S. Army document regarding contract procurement guidelines. On January 4, 2002, Amigo.Net filed a second *ex parte* communication, reiterating its arguments that Colorado's contract requires construction of a 70-ANAP network, that Qwest could charge statewide uniform rates, and that this rate scheme is illegal. Letter from Gregory O. Olaniran, attorney for Amigo.Net, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-220 (filed Jan. 4, 2002) (Amigo.Net January 4 *ex parte* letter).

¹⁴ *Public Utility Commission of Texas, et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order (*Texas Preemption Order*), 13 FCC Rcd 3460, 3480, para. 41 (1997).

¹⁵ 47 U.S.C. § 253(a).

¹⁶ 47 U.S.C. § 253(b).

¹⁷ 47 U.S.C. § 253(d).

¹⁸ *Texas Preemption Order*, 13 FCC Rcd at 3480, paras. 41-42; *Silver Star Telephone Company, Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 13 FCC Rcd 16356, 16360-61, paras. 8-11 (1998), *aff'd sub nom., RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000); *AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption*, Memorandum Opinion and Order, 14 FCC Rcd 11064, 11067-68, paras. 7-9 (1999), Memorandum Opinion and Order, 16 FCC Rcd 1247 (2001).

¹⁹ Amigo.Net, as petitioner, bears the burden of showing that Colorado's RFP and contract with Qwest violate section 253. This distinguishes the instant case from *Petition of the State of Minnesota for a Declaratory Ruling* (continued...)

support a finding that subsection 253(a) proscribes Colorado's contract, we do not reach the question whether the contract falls within the exceptions that subsection 253(b) provides.

B. Applicability/Scope of Section 253

7. We conclude that Colorado's contract does not fall within the scope of section 253. To make this determination, we focus on the contract's effect on the provision of telecommunications service – that is, whether the contract imposes a requirement that has the effect of prohibiting the provision of any telecommunications service. The Commission has indicated that a state could impose, as part of a contract to obtain telecommunications services, the type of legal requirement proscribed by section 253.²⁰ The simple act of forming a contract, which typically excludes from its provisions all entities not party to the contract, does not necessarily implicate section 253, however. The Commission has drawn a distinction between a contract in which the state was “merely acquiring fiber optic capacity for its own use” and a contract in which the state was granting its contract partner exclusive access to freeway rights-of-way, which other carriers would need in order to provide fiber optic services.²¹ In this latter instance, the Commission found that the state's contract might impose a legal requirement that would have the effect of prohibiting the ability of other carriers to provide service.²² However, Colorado's contract falls within the permissible first category because, as discussed below, fiber is acquired for Colorado's own use.

8. More specifically, Amigo.Net has not demonstrated that Colorado's contract with Qwest creates a legal requirement that has the effect of prohibiting the ability of any entity to provide advanced services in Colorado, for a fee, directly to the public.²³ For this reason, Colorado's contract is distinct from the contract the Commission considered in *Minnesota Preemption Order*. In *Minnesota Preemption Order*, the Commission determined that a state's procurement agreement would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.²⁴ This is not the case with the Colorado contract. Amigo.Net has

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Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order (*Minnesota Preemption Order*), 14 FCC Rcd 21697 (1999). In that case, Minnesota filed a request for declaratory ruling that a telecommunications procurement contract it formed was sound under section 253 of the Act. As petitioner, the state in that case bore the burden of proof, but it failed to demonstrate that its contract would not have the effect of prohibiting carriers from providing telecommunications services. Therefore, the Commission declined to grant Minnesota the relief it sought. Many parties who opposed Minnesota's petition had sought preemption of the contract, but the Commission did not preempt Minnesota's contract. Instead, the Commission requested that the parties provide additional information regarding the contract's practical effect. *See also California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997).

²⁰ *Minnesota Preemption Order*, 14 FCC Rcd 21697 (1999).

²¹ *Id.* at 21707-08, para. 19.

²² *Id.* at 21707-08, para 19.

²³ *Texas Preemption Order*, 13 FCC Rcd at 3496, para. 74; *Minnesota Preemption Order*, 14 FCC Rcd at 21708-09, para 21.

²⁴ *Minnesota Preemption Order*, 14 FCC Rcd at 21708-16, paras. 20-36.

not shown that Colorado granted Qwest any exclusive rights, similar to those the Commission found present in *Minnesota Preemption Order*, that would impede other carriers' ability to provide advanced services.²⁵ Amigo.Net claims the RFP created a legal requirement that Colorado award a single prime contract, to the exclusion of other potential providers of advanced services to state agencies.²⁶ However, there is no violation of section 253(a) merely because Qwest would be the sole provider of advanced services to a single class of customers, Colorado state agencies. The Commission has not interpreted that section to require a state to accept advanced telecommunications services from any company that wishes to provide such services to the state. Such an interpretation would curtail radically a state's ability to enter into a telecommunications service contract, and the language of section 253 does not support Amigo.Net's position.²⁷ As the Commission has indicated, in order to violate section 253 an agreement must have an adverse impact on the ability of another entity to provide telecommunications for a fee directly to the public. Amigo.Net has not shown that Colorado's contract would have this effect.

C. Applicability of Section 257

9. Section 257 of the Communications Act requires the Commission to complete a proceeding to identify and eliminate market barriers for "entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . ." ²⁸ In carrying out this proceeding, subsection 257(b) provides that the Commission,

shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of

²⁵ The precise rate structure governing Colorado's relationship with Qwest is unclear from the record before us. Amigo.Net argues that uniform statewide pricing would permit Qwest to charge lower rates in rural areas than Amigo.Net could charge, which would damage its ability to compete. Petition at 12-14; Amigo.Net Reply at 5, 7. Amigo.Net provides evidence that the MNT would eliminate backhaul charges for all customers and thus would change the pricing model for public and private users. Amigo.Net January 4 *Ex Parte* letter, Exhibits A and C. ALTS and BrandX Internet argue in support that since costs are typically higher in rural areas than in urban areas, charging a uniform rate across the state will lower artificially the price of ANAP services in rural areas, eliminating potential competition in those areas. ALTS Comments at 2-3; BrandX Internet Comments at 3-4. Colorado disputes Amigo.Net's assertion that the RFP or the contract imposed uniform statewide or flat-rate prices. Colorado Comments at 2, 13. Qwest states that it would charge Colorado monthly ANAP fees that range in price depending on the county seat location. Qwest Comments at 5. (It also is unclear whether Qwest could charge non-governmental customers of its ANAP services the same uniform statewide rate that Amigo.Net alleges that it charges the state.) In any event, Amigo.Net fails to demonstrate that a uniform rate would have the effect of prohibiting other entities from providing advanced services in the state.

²⁶ The parties dispute whether the RFP created a legal requirement that there be one contract. In its reply comments, Amigo.Net states, "The exclusive nature of the Contract legally binds the state to deny other entities, such as Petitioner, the right to contract with the state to provide ANAP services." Amigo.Net Reply at 5. Colorado concedes that the RFP contemplated one prime contractor and several sub-contractors. Colorado Comments at 2.

²⁷ For a broad discussion of section 253's applicability to a state's internal relationship with its political subdivisions, see *Missouri Municipal League Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 1157 (2001), appeal pending; *Texas Preemption Order*, 13 FCC Rcd 3460 (1997).

²⁸ 47 U.S.C. § 257(a).

the public interest, convenience and necessity.²⁹

10. Amigo.Net claims that Colorado engaged in a contracting process that had the effect of excluding small businesses from the bidding process in violation of subsection 257(b) of the Act.³⁰ However, section 257 does not grant separate authority upon which the Commission may preempt state law.³¹ Rather, the Commission proceeds according to its authority under section 253.³² As indicated above, Amigo.Net has not shown that Colorado has violated section 253 of the Act. Colorado envisioned awarding a contract to a single company which, perhaps in cooperation with other companies, would build an ANAP network and provide statewide service to government entities.³³ Amigo.Net maintains that small businesses are incapable of undertaking the expensive construction of the statewide network that Colorado's RFP sought, and therefore small businesses were excluded from the bidding process.³⁴ We note that while Amigo.Net did not submit a bid in response to Colorado's RFP, it did not present any evidence of small business incapacity to bid on the RFP.

²⁹ 47 U.S.C. § 257(b).

³⁰ Petition at 8.

³¹ See 47 U.S.C. § 257.

³² See *Section 257 Report to Congress, Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report (*Section 257 Report to Congress*), 15 FCC Rcd 15376, 15393, paras. 43-45. (2000). Subsection 257(a) of the Act directs the Commission to act to identify and eliminate barriers to market entry by small businesses, and the Commission has taken a number of regulatory initiatives, including enforcement of section 253 of the Act, in order to eliminate market entry barriers. *Section 257 Report to Congress*, 15 FCC Rcd at 15377-82, paras. 1-12. See also *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802 (1997). The Commission has defined "market entry barrier" as an impediment that would "significantly distort competition and harm consumer welfare." *Section 257 Report to Congress*, 15 FCC Rcd at 15384, para. 20.

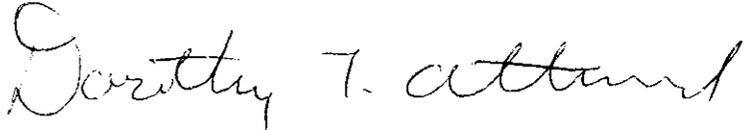
³³ Colorado Comments at 3, 15.

³⁴ Petition at 14; Amigo.Net Reply at 3. For support, Amigo.Net cites the Commission's *Texas Preemption Order*, 13 FCC Rcd 3460 (1997). In that case, the Commission preempted several provisions of the Texas Public Utility Regulatory Act of 1995, including a requirement that local telecommunications providers meet certain build-out thresholds using their own facilities or facilities other than those of incumbent local exchange carriers. The Commission concluded that Texas violated section 253 because it directly restricted the type of network a company could use to provide local service to the public. In addition, as Amigo.Net correctly points out, the Commission identified a second independent basis for its conclusion: Texas's facility restriction would have required expensive construction that would have a significant economic impact on any company seeking to provide service in the state, essentially preventing market entry. Therefore, Texas's build-out provision would have had the effect of prohibiting any entity from providing local services in Texas. *Texas Preemption Order*, 13 FCC Rcd at 3497-3500. This is distinct from the instant case. Here, the record contains no evidence that Colorado requires carriers to build their own networks in order to provide advanced services in the state. The RFP contemplated that a prime contractor would construct a single network, which it would use to provide service to state agencies and which it could also use to provide service to the public. The RFP does not appear to have required other entities to build their own networks in order to serve the public, nor does it appear to have had the effect of requiring such construction.

IV. ORDERING CLAUSE

11. Accordingly, it is ORDERED that the Petition for Declaratory Ruling and Injunction Pending Ruling filed by Amigo.Net IS DENIED.³⁵

FEDERAL COMMUNICATIONS COMMISSION



Dorothy T. Attwood
Chief, Wireline Competition Bureau

³⁵ Since we are rendering a decision on Amigo.Net's petition in this order, we dismiss its request for injunction pending consideration of that petition.

